IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 602 of 1986
with
CRIMINAL APPEAL No. 765 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHOK SOMALAL THAKKAR & 1
Versus
STATE OF GUJARAT

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Appearance :

Criminal Appeal No.602/1986
MR JM PANCHAL for Appellants No.1-2
MR IM PANDYA APP for Respondent

Criminal Appeal No.765/1986

MR IM PANDYA APP for Appellant
MR JM PANCHAL for Respondents
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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 20/06/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE J. R. VORA)

[1] Both the above referred Criminal Appeals have arisen from the same judgment and order delivered by the learned Additional Sessions Judge, Narol on 19th April, 1986 in Sessions Case No.12/1986. There were in all nine accused and were charged with the offences punishable under Sections 148, 323, 307, 302 to read with Section 149 of the Indian Penal Code as well as for the offences punishable under Section 135 of the Bombay Police Act, 1951.

[2] Vide above said judgment and order, the learned trial Judge acquitted all the nine accused for the offences charged against them so

far as the offences punishable under Sections 302, 307, 148 and 149 of the Indian Penal Code is concerned. While, except accused No.1 – Ashok Somalal Thakkar and accused No.3 – Arvind Somalal Thakkar, all other accused also were acquitted by the trial Court for the rest of the offences charged against said seven accused. Vide above said judgment and order, accused No.1 was convicted for the offence punishable under Section 323 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment of nine months and to pay fine of Rs.1,000/-, in default, to undergo imprisonment of six months, while accused No.3 was convicted for the offence punishable under Section 324 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment of two years and to pay fine of Rs.1,000/-, in default, to undergo imprisonment of six months. Accused No.1 and 3 as aforesaid were acquitted by rest of the charges levelled against them.

[3] Against the above said judgment and

order, so far as the order of acquittal of learned trial Judge is concerned in respect of all the accused, the State has preferred Criminal Appeal No.765/1986, while accused No.1 Ashok Somalal Thakkar and accused No.3 Arvind Somalal Thakkar, both preferred Criminal Appeal No.602/1986 against the conviction of each of the accused as aforesaid.

According to the prosecution case, deceased and victim of the incident is Bhailalbhai Madhabhai Patel, while injured is one Banesingh Vajesingh and one Rameshbhai. The incidents have taken in two parts, but as per the prosecution case, both the incidents have occurred in the same transaction and, therefore, the accused were charged in the same charge-sheet for both the incidents. According to the further prosecution case, deceased Bhailalbhai Madhabhai Patel and witness Jalaji Vajaji and other prosecution witnesses had enmity with accused persons and on account of that on 12th September,

1985 at about 9.30 a.m. all the accused formed unlawful assembly and with weapons like dharia, iron rod, sticks etc. first caused injuries to witness and complainant Banesingh Vajesingh near the houses of Gujarat Housing Board at village : Chandkheda on I.O.C. Road and, thereafter, they chased the witness – Jalaji Vajaji and near double storied buildings of Gujarat Housing Board caused injuries to deceased – Bhailalbhai Madhabhai Patel, who died on 14th September, 1985 and caused injuries to witness Rameshbhai. The complaint came to be filed by witness Banesingh Vajesingh at Adalaj Police Station right after the incident. According to the further prosecution case, injured Banesingh Vajesingh were three brothers, out of them two were residing at village : Chandkheda and to see his brothers, witness Banesingh Vajesingh used to visit village : Chandkheda about twice in a month and, therefore, he knew people residing at village : Chandkheda. On the day of incident, he had been to Sabarmati at 8.30 a.m. for purchasing

dhotis, and his brother – Jalaji Vajaji and one Vajubha Ramaji both had accompanied him. Vajubha Ramaji happened to be his cousin brother. After purchasing Dhotis from Sabarmati, all these three persons were returning to village : Chandkheda in one rickshaw. When their rickshaw reached near housing colony from the road of Railway Station and turned towards the housing colony, they noticed eight persons standing there, out of which Banesingh Vajesingh identified accused No.1, accused No.3, accused No.4 and accused No.5. According to him, accused No.3 i.e. appellant – Arvind Somalal Thakkar had a dharia with him, accused No.4 had a knife with him, accused No.1 and 5 had sticks with them, others had also sticks with them. According to him, he knew other accused, but not by name. According to the prosecution case, all those accused were standing near housing board colony. The accused halted their rickshaw and on rickshaw being stopped, his brother Jalaji Vajaji started running and witness Banesingh Vajesingh also

started running after Jalaji Vajaji. At that time accused No.3, appellant – Arvind Somalal Thakkar inflicted one blow by dharia on the head of Banesingh Vajesingh and, thereafter, accused No.4 inflicted a blow with knife between the fingers of left hand and left leg of Banesingh Vajesingh. Remaining accused started beating Banesingh Vajesingh with sticks. He fell down on the ground and, thereafter, one Vajubha Ramaji and Anupsinh brought him to Adalaj Police Station where he gave complaint. According to the further prosecution case, while Banesingh Vajesingh was being attacked, Jalaji Vajaji ran towards the double storied building. He heard the accused uttering that they had intended to beat Bhailalbhai Madhabhai Patel and one Ramesh Babulal. According to the prosecution case, Banesingh Vajesingh had acquittance with Ramesh Babulal and Bhailalbhai Madhabhai Patel. The witness – Jalaji Vajaji overheard utterance of the accused and, therefore, he ran towards Bhailalbhai Madhabhai Patel to convey him that

the accused were rushing to attack him and Ramesh Babulal. According to the prosecution case, Chaising Jalaji, accused reached near double storied building at village : Chandkheda where deceased Bhailalbhai Madhabhai Patel and other injured person Ramesh Babulal were standing. Reaching there, out of all the accused, accused No.1 inflicted a blow of stick on the head of deceased Bhailalbhai Madhabhai Patel. Accused No.1 also inflicted one stick blow on the back of the Bhailalbhai Madhabhai Patel. It is the further prosecution case that Bhailalbhai Madhabhai Patel had fallen on the ground and all other accused inflicted sticks injuries on Bhailalbhai Madhabhai Patel. It is also the prosecution case that one other accused i.e. accused No.1 inflicted stick blow on the head of witness – Ramesh Babulal and accused No.2 Natubhai Jivram inflicted a stick blow on one eye of witness Ramesh Babulal. According to the prosecution case, when at about 10.30 a.m. Banesingh Vajesingh was offering his complaint

before P.W.15 – Kanabharti Shivabharti, P.S.O. of Adalaj Police Station, the witness – Ramesh brought Bhailalbhai Madhabhai Patel at Adalaj Police Station and all the three were sent to hospital for further treatment. An investigation was handed over to Police Jamadar Jagdishchandra Ambalal Vyas, who is examined as P.W.16 and, thereafter, P.W.17 – Lallubhai Harilal Desai, examined at Ex.66, investigated further and submitted the charge-sheet against all the accused in the Court of learned Judicial Magistrate, First Class at Ahmedabad (Rural), Ahmedabad. The case was committed and learned Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad framed abovesaid charges against all the accused vide Ex.4 on 7th March, 1986. All the accused pleaded not guilty and the prosecution tendered oral as well as documentary evidence.

[4] We may categorize oral evidence with reference to prosecution case as under:

P.W.1 - Banesingh Vajesingh is examined

at Ex.21, who is complainant and injured in first incident.

P.W.2 - Jalaji Vajaji is examined at Ex.23 and he is an eye witness of injuries of witness Banesingh Vajesingh in first incident as well as he is also an eye witness of the second incident wherein deceased Bhailalbhai Madhabhai Patel was injured.

P.W.12 – Vajubha Ramaji is examined at Ex.52 being an eye witness of the first incident wherein injured Banesingh Vajesingh received injuries.

P.W.13 – Bipinchandra Dahyabhai is examined at Ex.53 and he is also an eye witness of the incident in which Banesingh Vajesingh received injuries.

[5] So far as second incident in which deceased Bhailalbhai Madhabhai Patel received injuries, **P.W.2** as aforesaid Jalaji Vajaji is examined at Ex.23 as an eye witness. **P.W.4** –

Rameshbhai Babubhai is also received injuries in second incident and he is an eye witness to the injuries of deceased Bhailalbhai Madhabhai Patel. He is examined at Ex.28. **P.W.5** – Babarbhai Meghabhai is examined at Ex.20. He is also an eye witness of the second incident in which Ramesh Babubhai and deceased Bhailalbhai Madhabhai Patel received injuries. **P.W.6** – Kanubhai Mehorbhai is examined at Ex.30 and **P.W.7** – Hargovindbhai Umedbhai is examined at Ex.31, who are the witnesses of the second incident in which deceased Bhailalbhai Madhabhai Patel and Ramesh received injuries.

[5.1] **P.W.3** - Dr.Tulsibhai Vashrambhai Bhalodia is examined at Ex.24, who examined injuries of deceased Bhailalbhai Madhabhai Patel at Ahmedabad Civil Hospital. P.W.9 – Dr.Sunil Maganlal is examined at Ex.35, who conducted postmortem on the deadbody of deceased Bhailalbhai Madhabhai Patel. P.W.10 Dr. Kanaiyalal Sakarlal Patel is examined at Ex.45, who examined injured Banesingh

Vajesingh at Civil Hospital, Ahmedabad and injured Ramesh, who was injured in second incident.

[5.2] **P.W.8** – Chandulal Mathurbhai is examined at Ex.32 being panch of discovery panchnama at Ex.34 by which it is stated that original accused No.2 discovered all weapons used by all the accused in both the incidents. P.W.10 – Sureshbhai Sedhabhai is examined at Ex.37 to prove the panchnama of scene of offence and that panchnama is at Ex.38.

[5.3] **P.W.14** – Govindbhai Jivabhai Pandya is examined at Ex.54 and being Circle Inspector, he prepared the maps of seen of offence, which are placed on record at Exs.55 and 56.

[5.4] **P.W.15** – Kanabharti Shivabharti is examined at Ex.58, who recorded and registered the complaint offered by injured Banesingh Vajesingh at Adalaj Police Station because this

witness was incharge of Police Station being Head Constable. P.W.16 – Jagdishchandra Ambalal Vyas is examined at Ex.65, who is first Investigating Officer and was Head Constable of Adalaj Police Station at the relevant time. P.W.17 – Lallubhai Haribhai Desai, the then P.S.I. of Adalaj Police Station is examined at Ex.66 being second Investigating Officer.

[6] Thus, the prosecution, in all, examined 17 witnesses.

[7] In addition to the above oral evidence, the prosecution also tendered documentary evidence as under.

A complaint offered by Banesingh Vajesingh at Ex.22. Panchnama of scene of offence at Ex.38, Panchnama of damage caused to the rickshaw at Ex.33, Discovery panchnama at the instance of accused No.2 at Ex.34, Inquest Panchnama at Ex.41, Postmortem Note of deceased Bhailalbhai Madhabhai Patel at Ex.36, Muddamal cloths of the

injured and deceased were sent to Forensic Science Laboratory and the opinion is produced at Exs.61 and 62. Ex.46 is the certificate of injuries caused to the injured Banesingh Vajesingh, while Ex.47 is the injury certificate for the injury received by Ramesh Babulal. Exs.25 and 26 are the case papers and X-Ray reports in respect of deceased Bhailalbhai Madhabhai Patel.

[8] Learned trial Judge, thereafter, recorded the statements of the accused under Section 313 of the Indian Penal Code wherein the case of each accused is of total denial and no defence witness was produced by the defence. After hearing both prosecution as well as defence counsel, the learned trial Judge came to the above said conclusion and hence, both these appeals as aforesaid.

[9] Learned APP Mr.I.M.Pandya for the State in appeal against the acquittal i.e. Criminal Appeal No.765/1986 as appellant and for the

respondent in Criminal Appeal No.602/1986 was heard in detail. While learned advocate Mr.K.J.Panchal for the appellants – accused in Criminal Appeal No.602/1986 and for the respondents in Criminal Appeal No.765/1986 was also heard in detail.

[10] So far as the appeal against the acquittal is concerned, learned APP Mr.I.M.Pandya vehemently urged that there were eye witnesses to the incident like injured witness Rameshbhai Babubhai, is examined at Ex.28 and supporting witnesses Babarbhai Meghabhai at Ex.29, Kanubhai Mehorbhai at Ex.30, Hargovindbhai Umedbhai at Ex.31 and supporting medical evidence is also brought on record, which could not be properly appreciated by the learned trial Judge in coming to the conclusion of acquittal of the accused in causing murder of deceased Bhailalbhai Madhabhai Patel and causing injuries to witness Rameshbhai Babubhai. It is vehemently submitted that there is no reason to disbelieve these many eye

witnesses, who are actual witnesses of the incident and reasons offered by the learned trial Judge for acquittal, appears to be perverse and an order of acquittal is result of improper appreciation of the evidence and, therefore, the conclusion requires interference by this Court. It is submitted that when witnesses have stated that they were present at the scene of offence and have witnessed the incident then it was improper on the part of the learned trial Judge to discard their evidence, so easily as if the witnesses were totally unreliable and that too on flimsy grounds. It is submitted that in fact charge against all the accused in respect of Sections 149 and 148 of the Indian Penal Code as well as under Section 302 of the Indian Penal Code of causing murder of deceased Bhailalbhai Madhabhai Patel is amply proved by the prosecution. It is, therefore, submitted that the appeal against the order of acquittal as preferred by the State i.e. Criminal Appeal No.765/1986 is required to be allowed causing

interference in the conclusion arrived at by the learned trial Judge. So far as the Criminal Appeal No.602/1986 of conviction of accused No.1 and 3 i.e. appellants of Criminal Appeal No.602/1986 is concerned, it is submitted by learned APP Mr.Pandya that in fact, both the accused are required to be held guilty for the offence punishable under Section 307 of the Indian Penal Code, as in the first incident, the person was injured i.e. Banesingh Vajesingh is examined and he is corroborated by P.W.2 – Jalaji Vajaji, P.W.12 Vajubha Ramaji and P.W.13 Bipinchandra Dahyabhai. It is submitted that the injury caused to Banesingh Vajesingh is proved by the prosecution through the evidence of Dr.Kanaiyalal Sakarlal Patel examined as P.W.11. He produced on record the certificate in respect of Banesingh Vajesingh as well as Rameshbhai Babubhai at Exs.46 and 47. According to the learned APP there is medical evidence in support of oral evidence. Therefore, it is urged that while allowing the acquittal appeal

even for the offence punishable under Section 307 of the Indian Penal Code, the question of interference in appeal against the conviction of appellants of Criminal Appeal No.602/1986 would not arise. In fact, according to the learned APP, these appellants also are required to be convicted for the offences punishable under Sections 149, 148, 302 and 307 of the Indian Penal Code along with other accused as submitted in appeal against the order of acquittal. Ultimately, learned APP submitted that while allowing Criminal Appeal No.765/1986, Criminal Appeal No.602/1986 filed by the original accused No.1 and 3 is required to be dismissed.

[11] As against that learned advocate Mr.K.J.Panchal for the appellants in Criminal Appeal No.602/1986 as well as for the respondents in Criminal Appeal No.765/1986 submitted that the prosecution case is found full of contradictions. Learned advocate Mr.Panchal drew the attention of this Court towards the contradictions which we

would discuss later on. It is submitted by the learned advocate that firstly, there is no motive for occurrence of the incident and secondly, it is not explained by the prosecution that why nine persons assembled and caused injuries to Banesingh Vajesingh, Bhailalbhai Madhabhai and Ramesh Babubhai. It is submitted that according to the prosecution case, Banesingh Vajesingh was not resident of village : Chandkheda and was outsider. If there was some enmity between accused and Bhailalbhai Madhabhai Patel in natural course, the accused would have straightway attacked Bhailalbhai Madhabhai Patel and it is not understood that why firstly Banesingh Vajesingh was injured by the accused. It is submitted that common object, therefore, on the part of all the accused is not proved. It is submitted that the prosecution case is destroyed on probability that how accused came to know that Banesingh Vajesingh and two others were coming in rickshaw after purchasing dhotis. It is also submitted that though Bhailalbhai Madhabhai Patel

was brought to the Police Station and Banesingh Vajesingh had offered his complaint and was in a position to give a statement, in spite of that neither his statement was recorded nor dying declaration was recorded. It is submitted that it clearly appears, however, on appreciation of the evidence of the eye witnesses that genesis of the incident was suppressed by the prosecution and the witnesses were not telling the whole truth before the Court. It is submitted that the learned trial Judge properly appreciated the evidence of the witnesses and taking into consideration major contradictions in the prosecution case acquitted all the accused from the charges levelled against them in respect of Sections 148, 149, 307 and 302 of the Indian Penal Code. It is, therefore, submitted that no interference is required in appeal against the acquittal i.e. Criminal Appeal No.765/1986. Unless, it appears that the conclusion arrived at by the learned trial Judge is perverse, in acquittal appeal, no interference is allowed by

the law. The learned trial Judge, for the reasons recorded by him, did not believe the eye witnesses. Learned advocate vehemently urged that it is not the law that the injured eye witness must be believed in all circumstances, but the law is, when a particular injured witness is not creditworthy he may not be believed eventhough he is injured. It is submitted that the learned trial Judge erred in convicting the accused No.1 and 3 which is subject matter of Criminal Appeal No.602/1986. Bringing again the contradictions in the depositions of the eye witnesses, learned advocate vehemently urged that the evidence of Banesingh Vajesingh on whose testimony, the learned trial Judge solely relied upon to convict accused No.1 and 3 is full of contradictions and is in conflict with medical evidence, the witness i.e. Banesingh Vajesingh was not coming before the Court with full truth and he has suppressed genesis of the incident. The complaint is filed within an hour of the incident and still, there are major contradictions between the evidence of

Banesingh Vajesingh and the complaint which he preferred before the police. It is submitted that the learned trial Judge discarding the evidence of all other eye witnesses in respect of injuries caused to Banesingh Vajesingh, relied upon the sole testimony of injured person Banesingh Vajesingh for convicting accused No.1 and 3 in respect of injuries caused to Banesingh Vajesingh. It is submitted that a major portion of testimony of Banesingh Vajesingh is not believed by the trial Judge and only placing reliance on a line of deposition of witness Banesingh Vajesingh, conviction is inflicted upon accused No.1 and 3. It is submitted that on account of major contradictions and taking into consideration over all circumstances, the witness Banesingh Vajesingh is not at all creditworthy and, therefore, to that extent, learned trial Judge erred in convicting the accused No.1 and 3 for the offences punishable under Sections 323 and 324 of the Indian Penal Code. It is submitted that complaint itself is cryptic and not giving

any details. The prosecution has examined mostly chance witnesses, who could not explain their presence at scene of offence and when major portion of the evidence of Banesingh Vajesingh is not relied upon by the trial Court, he would not have been believed for minor part of his evidence upon which the conviction of accused No.1 and 3 is based. It is submitted that since taking into consideration all circumstances together, the prosecution is not able to prove the case against the accused beyond reasonable doubt, the accused No.1 and 3 are entitled to benefit of doubt so far as injuries caused to Banesingh Vajesingh is concerned and hence, Criminal Appeal No.602/1986 is required to be allowed and accused No.1 and 3 are required to be acquitted of the charges under Sections 323 and 324 of the Indian Penal Code respectively for which each of these appellants – accused are convicted and sentenced. It is submitted that it is not the case that some portion of deposition of Banesingh Vajesingh is not trustworthy and portion regarding injuries

caused by accused No.1 and 3 is trustworthy, but the question is whether the evidence of witness Banesingh Vajesingh is so creditworthy as to inspire confidence for convicting accused No.1 and 3 for the injuries which Banesingh Vajesingh received during first incident and more particularly so when major portion of evidence of witness Banesingh Vajesingh, is not believed by the trial Court on account of credibility of the witnesses. According to the learned advocate for the appellants in Criminal Appeal No.602/1986, the learned trial Judge erred in coming to the conclusion that only some lines in respect of injuries caused by accused No.1 and 3 to Banesingh Vajesingh could be acted upon and rest of the whole evidence of Banesingh Vajesingh was not trustworthy. It is submitted, therefore, that the learned trial Judge ought to have come to the conclusion that the evidence of Banesingh Vajesingh on account of contradictions and over all circumstances of the prosecution case was not wholly reliable and the learned trial Judge ought

not to have convicted accused No.1 and 3 even for the offences punishable under Section 323 and 324 of the Indian Penal Code. It is ultimately urged that Criminal Appeal No.602/1986 preferred against the order of conviction of accused No.1 and 3 is required to be allowed and is liable to be set aside, while Criminal Appeal No.765/1986 against acquittal of all the accused for the aforesaid charges is required to be dismissed.

[12] Both the appeals have arisen from the same judgment and order and hence were heard together and being decided together. Though, the incidents involved in the prosecution case can be judged and appreciated separately and each incident can be scrutinized on its own merits, overall prosecution case is also required to be appreciated and scrutinized, taking into consideration both the incidents simultaneously.

[13] We have undertaken a complete and comprehensive appreciation of all vital feature

of the case in both the appeals and the entire evidence on record with reference to the broad and reasonable probabilities of the case, have been considered by us. The contentions raised by both the sides have also been taken into consideration. We have re-appreciated and scrutinized each corner of the case to come to our independent conclusion.

[14] Dealing with Criminal Appeal No.765/1986 by which all the accused are acquitted for the offences punishable under Sections 148, 149, 307 and 302 of the Indian Penal Code, it is necessary to have a look at the principles governing the appeals against the orders of the acquittal. In the matter of **Ajit Savant Majagavi v. State of Karnataka**, as reported in **(1997) 7 SCC 110**, the following principles are set by the Apex Court to deal with the appeal against the orders of acquittal. In para-16, the Apex Court observed in the aforesaid decision as under:

16. This Court has thus explicitly and

clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial Court. These principles have been set out in innumerable cases and may be reiterated as under:-

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider

each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in

mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

[15] We have gone through the reasons assigned by the learned trial Judge for acquitting the accused for the above said charges, which covers the second incident in respect of injuries caused to Bhailalbhai Madhabhai Patel on account of which he died and injuries caused to witness Rameshbhai Babubhai. Therefore, P.W.2 – Jalaji Vajaji, Ex.23, P.W.-3 Dr.Tulsibhai Vishrambhai Bhalodia, Ex.24, P.W.4 – Rameshbhai Banubhai, Ex.28, P.W.5 – Babarbhai Meghabhai, Ex.29, P.W.6 – Kanubhai Mehorbhai, Ex.30, P.W.7 –

Hargovindbhai Umedbhai, Ex.31, are the relevant witnesses and their evidence are required to be re-appreciated. The learned trial Judge did not place reliance on any of these witnesses for the reasons recorded by him in the judgment and order impugned in this appeal.

[16] It is the prosecution case that after the first incident, on overhearing the accused that they intended to beat Bhailalbhai Madhabhai Patel and Rameshbhai Babubhai, Jalaji Vajaji, P.W.2 ran towards the double storied building, situated at village : Chandkheda and there second incident occurred. According to P.W.2 – Jalaji Vajaji, he ran from the place of first incident, but in the meantime as soon as he reached where Bhailalbhai Madhabhai Patel and Rameshbhai Babubhai were standing, all the accused also chased him and reached at that spot. According to this witness, accused No.2 inflicted a stick blow on the head of deceased Bhailalbhai Madhabhai Patel. Thereafter, accused No.1 – Ashok Somalal Thakkar

inflicted a stick blow on the back of deceased Bhailalbhai Madhabhai Patel. Thereafter, he apprehended that the accused would also beat him and, therefore, he ran from the spot and went to the place where the first incident had occurred, but he was informed that injured Banesingh Vajesingh had been brought to Adalaj Police Station. This is all the witness said so far as the second incident is concerned. The learned trial Judge has not believed this witness. We have thoroughly gone through the evidence of this witness including his examination-in-cross. In respect of the contradictions which are proved in his cross-examination, what emerges from his evidence is that he might not be present when second incident occurred. Other witness of this incident i.e. first incident, P.W.13 Bipinchandra Dahyalal, Ex.53 categorically stated that at the juncture of the first incident, there were two roads; one led to Railway Station and second led towards Housing Board Buildings. According to the evidence of witness Jalaji Vajaji, he ran towards

the road leading to the Railway Station. Had it been so, then he ran to the opposite direction of the scene of offence of the second incident. The main reason for not believing the statement of Jalaji is that, he overheard the accused that the accused were leading towards causing injuries to Bhailalbhai Madhabhai Patel and Rameshbhai Babubhai. This statement by way of omission is proved by the defence that he did not state before police that he overheard of accused stating nor witness Jalaji Vajaji stated before police that accused No.2 – Natubhai Jivram inflicted a stick blow on the head of Bhailalbhai Madhabhai Patel nor he stated before the police that accused No.1 inflicted a blow of stick on the back of Bhailalbhai Madhabhai Patel. Therefore, his presence at the scene of offence in the second incident becomes doubtful. On scale of probability, if the whole evidence is tested, it becomes clear that if accused intended to beat Rameshbhai Babubhai and Bhailalbhai Madhabhai Patel, why would they be gathered at the scene of

offence of first incident which is about a kilometer away from the second incident. The evidence of Jalaji Vajaji, therefore, on careful scrutiny is not found reliable or probable so far as second incident is concerned in which deceased Bhailalbhai Madhabhai Patel and injured Rameshbhai Babubhai received injuries. In addition to this, if the evidence of Jalaji Vajaji as a whole is evaluated, it must be noted that his post incident conduct is also doubtful. He admitted in his cross-examination that he did not tell any one of occurrence of the incident even at his home also. He did not inform any one about this incident till police recorded statement on the next day in the hospital. He shielded his lapses in evidence by simply explaining that since police did not ask him, he did not state before the police whatever he stated in his examination-in-chief. The learned trial Judge, therefore, rightly did not place reliance on this witness so far as second incident is concerned, because on independent

scrutiny of his evidence, we also find that for the above said reasons, no reliance can be placed upon his evidence.

[17] Injured witness in respect of second incident is P.W.4 – Rameshbhai Babubhai at Ex.28. His injuries are though proved in the evidence of P.W.11 – Dr.Kanaiyalal Sakarlal Patel at Ex.45. A certificate is produced at Ex.47 wherein he had abrasions and bruise injuries in all nine at different part of the body. However, when his evidence is seen, he stated in his deposition that on the day of the incident, he was near double storied building of the housing board, situated at village : Chandkheda. He was with the deceased Bhailalbhai Madhabhai Patel. At that time accused No.1 – Ashok Somalal Thakkar came to them and he happened to be brother of accused No.3 and stated to Rameshbhai Babubhai that they had not done right things. In reply, he stated that they had not done anything wrong. According to this witness – Rameshbhai Babubhai,

thereafter, all accused started quarreling and he was sitting keeping his head down and he could not say that who gave blows to him and how he received injuries. On account of a blow received by him on head, he had fallen down and had not, thereafter, witnessed the incident. However, he was cross-examined by the prosecution declaring the witness as hostile. He denied the fact stated before the police about the incident. Now in this respect, while going through the evidence of this witness, it could only be said that though this witness had received injuries in the second incident, but it could not be proved that who inflicted those injuries. His evidence, therefore, is not useful for the purpose of injuries caused to deceased Bhailalbhai Madhabhai Patel and injuries received by himself in the said incident. The learned trial Judge, therefore, rightly did not place any reliance on the evidence of this hostile witness.

[18] The next witness so far as this incident

is concerned, is witness P.W.5 – Babarbhai Meghabhai, Ex.29. In his evidence, he stated that he knew Bhailalbhai Madhabhai Patel and injured Rameshbhai Babubhai and all the accused. The incident took place before six months of his deposition before the Court. At the time of incident, he was passing through near double storied housing board building, situated at village : Chandkheda at about 9.30 a.m., he witnessed the incident. According to him, 3 or 4-5 persons were beating deceased Bhailalbhai Madhabhai Patel and Bhailalbhai Madhabhai Patel was being beaten by sticks and blows were given on the head of Bhailalbhai Madhabhai Patel. He could recognize accused No.1 and 2 out of them. There were sticks in their hands. Accused No.1 and 2 inflicted sticks blows on the head of Bhailalbhai Madhabhai Patel and, therefore, he fell on the ground. He raised shout and, therefore, the accused had run away. According to this witness, in the incident he did not witness the accused causing injury to any one else,

except Bhailalbhai Madhabhai Patel. He stated that along with Bhailalbhai Madhabhai Patel, one Rameshbhai Babubhai was standing. This is all is the evidence of this witness. He has been cross-examined by the defence in detail. Having appreciated his evidence, it becomes clear that no reliance can be placed on this witness as well. This is so because integrated prosecution case is that in the said incident, Bhailalbhai Madhabhai Patel and Rameshbhai Babubhai both were injured. This witness Babarbhai did not notice the injuries caused to Rameshbhai Babubhai in this incident. On account of this version of this witness in respect of stick blows by accused No.1 and 2 on the head of Bhailalbhai Madhabhai Patel becomes doubtful. This is more so because he was not believed to justify his presence at the scene of offence. He has been cross-examined in detail in this regard. According to him, at the time of the incident, almost all houses of double storied housing board were vacant. He failed to explain that in those circumstances, how he happened to

be passing through near the place of the incident. His statement was recorded by the police on 15th September, 1985 i.e. after three days of the incident. Moreover, in cross-examination, this witness admitted that till 15th September, 1985, he did not utter a word to anybody about the incident. He is found to be interested witness and a neighbour of witness Jalaji Vajaji, he caused himself to be panch of panchnama of scene of offence and that is not the case of prosecution. In examination-in-cross, he categorically stated that he was present at the time of panchnama of scene of offence. Thus, the facts elicited in his cross-examination renders his evidence improbable. It is noted here that only because he could not explain his presence at the time of incident or he is related to Jalaji Vajaji, his evidence does not become unreliable, but the cumulative effect of infirmities in his evidence like failure to witness the injuries caused to Rameshbhai Babubhai, and an attempt to become a panch witness of scene of offence and

omission in examination-in-chief to state the role of the other accused in the incident, all taking together with the circumstances that he was interested witness and, that, there was no reason for him to be present at the time of scene of offence at the relevant juncture renders his evidence not trustworthy. For the said reasons, the trial Court rightly did not place any reliance upon the deposition of this witness.

[19] The next eye witness in this respect is P.W.6 – Kanubhai Mehorbhai, Ex.30. He stated that he knew all the accused of the incident which took place on 12th September, 1985 at about 9.30 a.m. He was passing through near double storied building of the housing board, he noticed 8-10 persons came running with sticks. Accused No.1 and 2 were amongst them. He identified these accused in the Court. Accused No.3 had dharia in his hand and accused No.4 had an iron road with him. The others had sticks. Accused No.1 and 2 inflicted stick blows on the head of Bhailal.

Near Bhailal, one person named Ramesh was also standing. On the eye of Ramesh, accused No.2 inflicted a stick blow. Thereafter, Bhailal became unconscious and, thereafter, Ramesh was beaten by the accused. One Manubhai came there and took Ramesh and Bhailal in rickshaw. This is all the evidence of this witness. We have scrutinized his evidence with reference to the probability as well as cross-examination of the witness conducted by the defence. From his cross-examination, it becomes clear that he makes improvement in his deposition. He did not state before the police that Ramesh was beaten after Bhailal became unconscious and had fallen on the ground. Even he had not stated before police that accused No.1 and 2 gave stick blows on the head of Bhailal. This is clear from his cross-examination and proved by the defence. The contradiction goes to the root of the prosecution case and credibility of this witness. Even he did not state before the police that accused No.2 gave a blow with stick on the eyes of Ramesh, who

was standing beside Bhailal and Bhailal fell on the ground. It appears that major improvements, he makes in his deposition in the manner of occurrence of the incident which creates doubt in respect of he being present at the time of incident. Cumulatively when this infirmity in the evidence of this witness is considered along with his deposition that he was distributing the milk in his area, his say of witnessing the incident becomes further doubtful. According to him, he starts distributing milk at 6.30 a.m. and he takes almost 2.00 hours to complete the distribution of the milk. If that be so, again, it creates doubt that how this witness was present at the time of incident at about 9.30. a.m. at the scene of offence. When he categorically states that after distribution of milk or during such distribution of milk, he happened to be passing through near the scene of offence. Again he admitted in his cross-examination that he was called by the police at Chandkheda Bus Stand for recording of his

statement on 14th September, 1985. Till then, he did not inform anybody about the incident and this conduct of the witness renders the evidence of unworthy of credit. The trial Court, therefore, rightly did not place any reliance on this witness in respect of second incident.

[20] The next eye witness in respect of second incident is one Hargovindbhai Umedbhai, P.W.7 who is examined at Ex.31. In his deposition, he stated that he knew all the accused and knew accused No.2 and 5 by their names. The incident occurred on 12th September, 1985. He had been to Jantanagar for his personal work and while he was passing through near double storied building at about 9.30 a.m., near House Nos.484 and 485, he witnessed the incident. He was standing 5 feet away from the scene of offence. He witnessed that accused No.2 – Natubhai and accused No.5 – Narsinh Jivram were inflicting stick blows on the head of deceased Bhailal. He identified both the accused before the Court. He stated that there

were 4-5 other persons along with these accused. At that time according to this witness, Ramesh was also standing there and when Ramesh tried to intervene, one person hit Ramesh with iron rod and the other persons hit Ramesh with sticks. The stick blows were inflicted on the head of Bhailal by accused No.5 and, thereafter, Bhailal had fallen on the ground and accused No.2 inflicted stick blows on body of Bhailal to the extent that the stick had broken down. According to this witness, this incident had been noticed by Kanubhai and Babarbhai. On account of intervention by these persons, the accused ran away on the spot and one person named Manubhai took Ramesh and Bhailal in rickshaw.

[20.1] Witness Hargovindbhai has been cross-examined by the defence in details. On scrutiny of evidence, it is found that this witness has also made improvement in his deposition, so as not to give any credit to his evidence. He did not state before the police that he saw the

incident at the distance of 5 feet. He did not state before the police that Bhailal fell down facing the ground and accused No.2 inflicted blows with stick on the back of Bhailal till the stick was broken. The story of intervention by Ramesh is not stated by him before the police and he only stated that one person named as Ramesh was beaten with iron road and with sticks. The story of inflicting blow with iron rod is not stated by this witness before the police. He did not also state before the police that accused No.5 gave blows with stick to Bhailal. With these contradictions, in his evidence, if other circumstances are considered, his presence became doubtful at the scene of offence. According to this witness, he had gone to Jantanagar for his personal work. He admitted in his cross-examination that for going to Jantanagar, it was not required to go through the housing board double storied buildings. However, he came with the explanation and volunteered that in a double storied building, he had to go to one Darbar

Manuji Pratapji. When his explanation is tested in cross-examination, he came with the statement that he did not know in which block, said Darbar Manuji Pratapji resided. His statement was recorded by the police on 15th September, 1985 on highway. According to this witness, until his statement was recorded, he did not utter a word in respect of the incident before anyone else. From the cross-examination, it becomes clear that except accused No.2 and 5, the other accused were seen by this witness only at the time of incident and, thereafter during the trial. His statement that he knew the accused, therefore, becomes doubtful and to corroborate, admittedly, the prosecution appears not to have been supported by test identification parade of the accused by this witness. It appears that except accused No.2 and 5, other accused were unknown to this witness. On scrutiny of the cross-examination of this witness, it appears that major part of examination-in-chief is contradicted by his police statement and most of his say before the

Court in his deposition, appears not to have stated by him before the police. No reliance can be placed upon such witness and, therefore, the trial Court rightly not placed any reliance on this witness.

[21] The other relevant witness in this respect is the panch of discovery panchnama Ex.34, P.W.8 – Chandulal Mathurbhai, examined at Ex.32. It is the prosecution case that all the weapons even used by the other accused were discovered at the instance of only accused i.e. accused No.2. The evidence of discovery is also not helpful to the prosecution case. Ex.34 panchnama of discovery is firstly not proved and secondly in para-2 of his deposition, this witness Chandulal categorically stated that the discloser statement was made by the accused No.2 before the Police Sub-Inspector and not before the panchas. The discovery, therefore, is hit by the provisions of the Evidence Act, not only that but this witness stated that all the weapons as

used by all the accused, were discovered at the instance of the accused No.2 and such discovery is not creditworthy.

[22] The injuries received by deceased Bhailal and injured Ramesh is proved by evidence of Dr.Kanaiyalal Sakarlal Patel, P.W.11 at Ex.45 and Dr. Talsibhai Vishrambhai Bhalodia, P.W.3 at Ex.24. Dr. Talsibhai Vishrambhai Bhalodia, P.W.3 at Ex.24 stated in his deposition that Bhailal was brought to him in Civil Hospital without police Yadi. He was brought by some relatives. On examination,the following injuries were found on his person.

[1] The diffused tender swelling on the left side of the forehead with abrasion of 1″ x 1″.

[2] Diffused tender swelling on the left side of the face with abrasion of 1″ x 1″.

[3] Diffused tender swelling on the left

side frontal region.

[4] Diffuse tender swelling over the right knee.

According to this witness, the relatives of the injured gave history of the offence that some Darbars had beaten the injured at 10.00 a.m. on account of collision of rickshaw. This Doctor produced on record certificate and case papers etc. This Doctor stated that this patient was unconscious at the time when he was brought before him, he was operated on 13th September, 1985 for head injury by neuro surgeon. According to this Doctor, injuries were fatal and sufficient to cause death in ordinary course of nature. The injuries, according to the Doctor, could be caused by hard and blunt substance like a stick. Thereafter, Dr.Sunilkumar examined at Ex.35, conducted postmortem of the deceased. After noticing external as well as internal injuries, this witness also came to the conclusion that the cause of death was

haemorrhage and shock as a result of head injury sustained by the patient.

[23] Thus, so far as homicidal death of the deceased Bhailal is concerned, there is no dispute. But as stated above when it could not be proved beyond doubt by the prosecution that all the accused forming unlawful assembly attacked on Bhailal and Ramesh both, acquittal by the trial Court of all the accused was justified in the circumstance. The learned trial Judge also took into consideration the circumstances in which deceased Bhailal was brought to the Police Station and directly sent to the Hospital. At that time Bhailal was conscious and no attempt was made on the part of anybody to record his statement and even dying declaration. In his case papers produced on record, it is found that up till 4.00 p.m. on that day, deceased Bhailal was conscious and was able to follow the instruction given to him. Taking into consideration all these circumstances, as observed in para-28 of the

judgment, the learned trial Judge came to the conclusion that the prosecution failed to establish beyond reasonable doubt that the accused caused injuries on deceased Bhailal on account of which he died and that any of the accused caused injuries to Ramesh.

[24] We also independently considering the evidence, reached to the same conclusion arrived at by the trial Court. The trial Court had advantage to watch the demeanor of the witnesses and observing their conduct in the witness box. The trial Court has given detail reasons for not placing reliance on the eye witnesses. Injured eye witness Ramesh has turned hostile and has not stated anything about his injuries before the Court. For reasons stated above, it is not possible for this Court to interfere in the appeal against the order of acquittal delivered by the learned trial Judge and hence, Criminal Appeal No.765/1986 preferred by the State must fail.

[25] Now Criminal Appeal No.602/1986 covers the first part of the prosecution case wherein allegedly P.W.1 – Banesingh Vajesingh received injuries at the hands of the accused. It must be noted at this juncture that though two separate incidents have occurred and as per the prosecution case, both incidents were in the same transaction and hence one charge-sheet against all the accused. True it is that the first part of the prosecution case and the second part of the prosecution case are in a way separate. So far as the probability is concerned for convenience of appreciation of the evidence of witnesses, two parts can be discussed separately, but each part of the prosecution case has its own effect on the other part which forms one integrated prosecution case. Keeping in mind this important aspect of the prosecution case, if the first part of the prosecution case is scrutinized and appreciated, it appears that for the injuries caused to witness Banesingh Vajesingh, there are

four witnesses to be taken into consideration. Those witnesses are P.W.1 – Banesingh Vajesingh at Ex.21, P.w.2 – Jalaji Vajaji at Ex.22, P.W.12 – Vajubha Ramaji at Ex.52, P.W.13 – Bipinchandra Dahyalal at Ex.53. P.W.1 – Banesingh Vajesingh is a injured witness and rest are eye witnesses. In support, P.W.11 – Dr.Kanaiyalal Sakarlal Patel, at Ex.45, is examined, who noticed injuries of Banesingh Vajesingh and he is also relevant as well. The evidence of P.W.15 – Kanabharti Shivabharti, at Ex.58, who recorded the complaint of Banesingh Vajesingh, is also relevant.

[26] When we perused the appreciation of the evidence by the trial Court, it is revealed that the trial Court did not place any reliance on three eye witnesses i.e. Jalaji, Vajaji, Bipinchandra Dahyabhai and Banesingh. The trial Court also did not place reliance on major part of testimony of Banesingh Vajesingh. But the trial Court relied upon part of testimony of Banesingh Vajesingh about inflicting dharia

injury by accused No.3 and stick injury by accused No.1, who are appellants in Criminal Appeal No.602/1986.

[27] We have gone through the evidence of P.W.2 – Jalaji Vajaji at Ex.23. So far as the first incident is concerned, when we appreciated the evidence of Jalaji Vajaji, it is found that he stated that Banesingh Vajesing, Jalaji and Vajubha had been to purchase dhotis from Sabarmati and were returning in rickshaw, on IOC Road at village Chandkheda, near houses of housing board. Accused halted rickshaw and, therefore, all the three immediately got down from the rickshaw and started running. Jalaji was first in escaping, while Banesingh Vajesingh was following him. At that time, Jalaji witnessed that accused No.3, appellant – Arvind Somalal Thakkar inflicted a dharia blow on the head of Banesingh and, therefore, he fell down on the ground. Thereafter, accused No.2 inflicted stick blows on the back of Banesingh Vajesingh. Firstly

as discussed earlier, it is impossible to believe that while running towards the double storied building or as a case emerges from appreciation of the evidence, towards the Railway Station, Jalaji might have witnessed the incident as he has stated. What is material is cross-examination of this witness wherein he categorically admitted that he did not state before the police that who inflicted the blows to Banesingh Vajesingh, out of the accused and by which weapons. In fact, therefore, Jalaji can not be considered to be an eye witness, of the incident. Contradictions as elicited in the cross-examination, are proved in the deposition of the Investigating Officer. Almost, his whole examination-in-chief is contradicted. In fact, if para-5 of the testimony of P.W.16 – Jagdishchandra Ambalal Vyas is seen, it is crystal clear that Jalaji was neither a witness for the injuries caused to Bhailal and Ramesh in second part of incident nor he is the witness for the first part of the incident occurred on the IOC Road concerning Banesingh

Vajesingh. According to the statement, he made before the police, he came to know about the injuries of Bhailal and Ramesh when he reached at Adalaj Police Station and the incident was reported to this witness by injured Ramesh. This aspect of prosecution case is important to ascertain credibility of this witness, while on the other hand in his cross-examination; he admitted in para-6 that he had not stated anything about who caused injuries to Banesingh Vajesingh and by which weapons. Though he offers an explanation that since the police did not ask him about the same, he did not state before the police, but this excuse is lame and attempt on the part of the witness to become an eye witness. His presence at both the scene of offences becomes doubtful and renders his testimony not creditworthy. We are not inclined to place any reliance on testimony of this witness and the trial Court has rightly not placed any reliance on him.

[28] So far as P.W.13 – Bipinchandra Dahyalal,

at Ex.53 is concerned, he stated that on the day of the incident, on scooter at about 9.30 a.m. from Jantanagar, he had been to Chandkheda and from Chandkheda he was going towards “D” Cabin through IOC Road. He witnessed that near the houses of the housing board, some 7-8 persons were beating one person and one person was running from the spot and one person was running behind the first person. He identified the accused No.2, 3, 4, 5, 6 and 8 before the Court. According to his testimony, accused No.4 had an iron rod in his hand, while other accused had sticks in their hands. He halted his scooter and got down and witnessed the incident. When his evidence is scrutinized with reference to cross-examination, it becomes clear that his evidence cannot be believed on credibility of the deposition of the witness. Firstly, the witness stated that all accused, except accused No.4 had sticks in their hands, while accused No.4 had an iron rod, this is not even the original prosecution case. Conveniently, this witness

though stated to have witnessed the first part of the incident, omitted to state that which of the accused caused injury to Banesingh Vajesingh. If we take the gist of the evidence of this witness, it gives impression that all the accused indiscriminately were beating Banesingh Vajesingh with sticks and iron rod, but this is not the say of the other witness and even in medical evidence, these many injuries could not be established. With these infirmities in the evidence of this witness, if we further probe the prosecution case, it is revealed that the witness failed to explain his presence at the relevant juncture to witness the incident. The statement of this witness is recorded on 15th September, 1985 of the incident of 12th September, 1985. Though he knew the accused, he knew the parties, it is not explained that how, till 15th September, 1985, he remained silent and did not offer his statement to police about the incident. Only when according to the witness, he was called by the police informing him that he was an eye witness,

he offered his statement. Even if we ignore the contradiction that he omitted in his statement before the police that after parking his scooter, he witnessed the incident, we cannot ignore that he offered two versions in his cross-examination in para-4, on one hand he stated that he did not intervene in the quarrel, while on the other hand in his deposition, he stated that he himself and one Jayantibhai intervened and, therefore, Thakkars (accused) ran towards the road of housing colony. On the whole as stated above, this witness fails to establish beyond doubt the injuries caused to complainant P.W.1 – Banesingh Vajesingh and whatever stated by him, is neither here nor there to come to the conclusion that either accused No.1 or accused No.3 by stick and dharia inflicted injuries on Banesingh Vajesingh. The learned trial Judge did not rely upon this witness. On above said scrutiny of the evidence of this witness, we are also not inclined to place any reliance on this witness alleged to have been as an eye witness.

[29] Other witness P.W.12 – Vajubha Ramaji is examined at Ex.52. His evidence is not at all helpful to the prosecution case, so far as first part is concerned. In his evidence, he stated that along with Banesingh Vajesingh and Jalaji, he was in the rickshaw and the incident occurred. Accused No.1 to 7 halted rickshaw and started giving stick blows on rickshaw. He stated that which accused had dharia, he could not say. He stated that he did not know the names of any of the accused. He specifically stated that accused gave stick blows to Banesingh and Jalaji, but he did not witness that incident because he had concealed himself. The witness had not been declared hostile and as aforesaid, this witness is not helpful to the prosecution.

[30] Now coming to the star witness i.e. P.W.1 – Banesingh Vajesingh, he stated that while all the three were returning in a rickshaw, 8 persons near housing colony halted rickshaw, out of them

he knew 4 persons. He identified accused No.1, 3, 4 and 5. According to him at that juncture, accused No.3 – appellant herein had a dharia with him. Accused No.4 had a knife with him, while accused No.1 and 5 had sticks with them. Except these four accused, he did not know remaining accused by names, but only by face. While they were descending from rickshaw, accused No.3 chased him and inflicted a blow of dharia on his head and, thereafter accused No.4 inflicted a knife blow on the fingers of his left hand. Thereafter, accused No.1, 2 and 5 inflicted blows of stick on his left hand and left feet and he had fallen down on the ground. Thereafter, he stated that he was taken at Adalaj Police Station in rickshaw and he offered his complaint. He has been cross-examined in detail by the defence. From his evidence and from the cross-examination, it is found that first important contradiction is in respect of the manner in which the incident occurred. In his complaint as proved, he stated that they were coming on foot at IOC Road, while

in deposition the theory of rickshaw was brought in. In the complaint, he stated that accused No.3, accused No.1, accused No.7 and accused No.4 came with dharia and sticks and ran towards Jalaji to beat him and, therefore, he also ran with Jalaji. While in his deposition, he stated that there were 8 persons standing when they descended from rickshaw and he identified four accused armed with dharia, sticks and knife. In contradiction, he stated that accused No.1 gave blow in his left hand and leg. However, this fact has not been stated by him in his complaint. Further contradiction is found in respect of accused No.4, though he is not appellant in this conviction appeal, but to ascertain the credibility of this witness, the fact stated by Banesingh must be considered. It is found that when there is no reference of any knife blows in the complaint, the witness stated in his deposition that accused No.4 inflicted a blow with knife between his fingers of his left hand, while in his complaint, he specifically stated

that accused No.4 inflicted a blow with iron bar on his hand. In cross-examination, he further stated that the whole crowd had beaten him with sticks and knives for about five minutes. We do not find these many injuries on his body, as per the medical evidence. The evidence is found full of exaggeration and contradictions going to the root of the prosecution case. The witness is appreciated by the trial Court in his judgment; vide paragraphs No.8, 9 and 10. In para-9, the learned trial Judge has stated that except accused No.1, accused No.3, accused No.4 and accused No.7, the witness did not know any of the accused and no T.I. parade was held by the prosecution. It is not explained by him that how he knew other accused by face, when he was not residing at Chandkheda and was outsider and except accused No.1, accused No.3, accused No.4 and accused No.5, the witness did not give any names of the accused in FIR. The contradiction in respect to the blows inflicted by other accused, is also relevant, particularly contradiction

about the blow by accused No.4, whether by iron bar or by knife, is also referred by the learned trial Judge. Therefore, the learned trial Judge came to the conclusion that except limited role played by accused No.1 and accused No.3,, the whole story narrated by the injured witness Banesingh Vajesingh was not reliable on account of the contradiction between his deposition and the complaint i.e. first version he gave before the police. The learned trial Judge, thereafter, referred to the medical evidence i.e. evidence of Dr.Kanaiyalal Sakarlal Patel at Ex.46. The learned trial Judge came to the conclusion that in complaint about the accused No.1, the witness stated that accused No.1 inflicted stick blow and that is corroborated by the medical evidence and the witness stated that so in his deposition, so far as accused No.3 is concerned, this witness according to the trial Court stated in his complaint that accused No.3 inflicted dharia blow which is corroborated by medical evidence and the witness deposed before the court. Therefore, the

trial Court came to the conclusion that though major portion of the deposition of this witness was not reliable but his evidence could be relied upon for the injuries caused by accused No.1 and accused No.3. The trial Court came to the conclusion that though the evidence of this witness was full of contradiction and exaggeration and it was not proper to throw overboard the whole of the testimony and since the maxim *falsus in uno, falsus in omnibus* is not applicable in the criminal trial, this witness could be believed for the injuries caused by accused No.1 by stick and dharia blow inflicted by accused No.3 on the head. The whole rest of testimony of this witness is not believed and hence, accused No.1 is convicted under Section 323 of the Indian Penal Code, while accused No.3 under Section 324 of the Indian Penal Code.

[31] Thus, so far as the first part of incident is concerned, out of four eye witnesses as aforesaid, we came to the conclusion that

three witnesses are not reliable at all for the aforesaid reasons. We also subscribe the view of the trial Judge that the major part of the testimony of injured Banesingh Vajesingh is also not reliable and cannot be believed, but we are unable to uphold the conclusion of the trial Court that this witness was reliable even for only limited extend that a stick blow was inflicted by accused No.1 and dharia blow was inflicted by accused No.3 for which both the accused are convicted, which is a subject matter of this appeal. In our humble opinion, witness Banesingh Vajesingh cannot be believed even for inflicting stick blow by accused No.1 and dharia blow by accused No.3. Conviction based by the trial Court in respect of accused No.1 and 3 relying upon a small part of testimony of this witness, in our view is required to be interfered with for the following reasons.

[32] True it is that a injured witness must be given greater weightage, so far as his

credibility is concerned because on account of injuries, his presence at the scene of offence cannot be doubted. At the same time, it is also true that *falsus in uno, falsus in omnibus,* the principle is not applicable in India because it is a rule of caution and not rule of law. Even when major portion of evidence of a witness is found unreliable, the remaining part of evidence if inspired confidence and sufficient to prove the guilt of accused, the conviction can be based thereon. This is so because the witnesses have tendency in this country to exaggerate, embroider and to implicate as many accused in criminal trial as suiting to their convenience. Therefore, in these circumstances, it becomes a duty of the court to separate the grain from the chaff and to find in each case as to what extent the evidence is acceptable. The doctrine *falsus in uno, falsus in omnibus* merely involves the question of weightage of evidence which a court may apply in a given set of circumstances and not a mandatory rule of evidence, it has to apply in each case as

to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of rule that it must be disregarded in all respects as well. But where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto.

[33] Thus, to place reliance on a small part of testimony of a witness is though permissible, but depending on facts of each case and weight to be attached to the creditworthiness of such witness. If the witness is found creditworthy to

the extent to rely upon a small part, the conviction can be based, but the testimony is such as requires to be discarded in toto, it is dangerous to rely on a small part of testimony of such witness.

[34] Now credibility of a witness is not a matter related by rules and procedure. It depends upon many factors like power to speak truth, and will of the witness to express truth and truth only. Regards for the truth, enmity from inner conscious of witness is a matter to be discerned by the Courts depending upon various circumstances arising out of the prosecution. It must be noted that credibility of a witness has to be decided by referring to his evidence as a whole and not analyzing the evidence in parts and dissecting the whole evidence. Probability depending on the circumstances of the prosecution case, contradiction going to the root of the case and overall circumstances are the major ingredients by which credibility of a witness can

be judged.

[35] In this particular case, therefore, the question now arising is whether P.W.1 – Banesingh Vajesingh is so credible as to rely upon a small part of testimony separating the same from other major portion of his deposition. We are required to consider the prosecution case as a whole in this respect.

[36] The important aspect which we find strikingly discrediting these witnesses are motive of the incident, genesis of the prosecution case and improbabilities on account of contradiction in the prosecution case.

[37] True it is that the motive is never relevant in criminal trial, when direct evidence is available. When it is proved by direct evidence that injuries have been caused, motive remains in the back ground. This is so because, motive remains in the mind of the accused and

sometime may not be disclosed at all. But when in case where the ocular testimony is found not trustworthy, the absence of motive assumes some significant regarding probability of the prosecution case.

[38] We are conscious of the principles that in criminal trial, a decision on set of certain facts may not be a precedent for another trial on set of different facts. But at the same time, when Apex Court lays guideline for appreciation of evidence, such guideline becomes precedent to be followed by other Courts. With reference to a murder charge and while dealing with a criminal appeal, in the matter of **Badam Singh Vs. State of M.P.**, as reported in **(2003) 12 SCC 792**, the Apex Court in respect of motive observed as under in para-20.

> **20.** We also find that there was no motive for the appellant to kill the deceased. Even though existence of motive loses

significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. In this case the brother of the deceased, PW-7 clearly stated that even though there was some dispute between the appellant and the deceased three years before the occurrence, that dispute was amicably settled and the disputed land was shared half and half by them. Thereafter they continued to cultivate their respective plots of land peacefully and no untoward incident took place whatsoever. We must, therefore, hold that the prosecution has failed to establish any motive for the offence. The fact that the deceased met a violent death is not surprising. He was a history sheeter and he was involved in large number of

> criminal offences including dacoity, robbery, abduction, kidnapping and attempt to murder etc. The possibility of his having been killed by one of his enemies cannot be ruled out.

[39] In the above said decision, the Apex Court with reference to appreciation of evidence also observed that consistent testimony of witness is not sure guarantee of truthfullness. Thus, when credibility of witness is impeached in cross-examination or otherwise, the court may come to the conclusion that the conduct of witness was such that it rendered the whole case of prosecution doubtful or incredible or when their presence at the place of occurrence as eye witnesses is suspected, the court may reject their evidence. Likewise, if it is found that the prosecution witnesses suppressed genesis of the incident, they are not entitled to creditworthiness. The same should be the approach while appreciating the evidence where on account

of major contradiction, the prosecution case is rendered improbable.

[40] Thus, the question in this case is whether the small part of the testimony of Banesingh relied upon by the learned trial Judge for inflicting conviction is creditworthy on anvil of scrutiny of the prosecution case as a whole even though the stick blow and dharia blow has been consistently deposed by the witness in his F.I.R. and even supported by the medical evidence. The question is whether this consistency, with reference to the whole prosecution, a sure guarantee of truth ?

[41] In the matter of **Pandurang Sitaram Bhagwat Vs. State of Maharashtra**, as reported in **(2005) 9 SCC 44** in respect of maxim *falsus in uno, falsus in omnibus,* in para-20 in respect of charge under Section 354 in dealing with the appreciation of evidence, the Apex Court observed as under:-

"**20.** We are not oblivious that the doctrine "*falsus in uno, falsus in omnibus*" is not applicable in India but the evidence led by the parties must be appreciated keeping in view the entirety of the situation. The trial Judge, as noticed hereinbefore, came to the conclusion that most of the statements made by PW 2 and PW 3 were incorrect and no reliance could be placed thereon. The statements of the said witnesses with regard to commission of an offence by the appellant under Section 354 IPC should have been considered keeping in view the extent of falsity in their stastements. PW 2 and PW 3 not only failed to substantiate the allegations as regards commission of offences under Sections 323, 504, 506 read with Section 34 IPC but also implicated the three persons falsely. The statements of the said

witnesses should have been accepted with a pinch of salt and keeping in view the admitted animosity between the parties. The background of the case vis-a-vis continuous animosity between the complainant and her husband, on the one hand, as also the appellant and his other tenants could not have been lost sight of by the learned trial Judge."

Likewise in the matter of **State of Rajasthan Vs. Bhanwar Singh**, as reported in **(2004) 13 SCC 147** in respect of infirmities, lapses and omissions in the prosecution case, the Supreme Court observed that the combined effect of such infirmities, lapses, omissions must be judged. With reference to appreciation of the evidence in an appeal of a murder trial, in para-6, the Apex Court observed as under:-

"**6.** We find that the High Court has carefully analysed the factual position.

Though, individually some of the circumstances may not have affected veracity of the prosecution version, the combined effect of the infirmities noticed by the High Court are sufficient to show that the prosecution case has not been established. The presence of PWs. 3, 4 and 8 at the alleged spot of incident has been rightly considered doubtful in view of the categorical statement of PW-5, the widow that she sent for these persons to go and find out the body of her husband. It is quite unnatural that PWs. 3, 4 and 8 remained silent after witnessing the assaults. They have not given any explanation as to what they did after witnessing the assault on the deceased. Additionally, the unexplained delay of more than one day in lodging the FIR casts serious doubt on the truthfulness of prosecution version. The mere delay in lodging the FIR may not

prove fatal in all cases. But on the circumstances of the present case, certainly, it is one of the factors which corrodes credibility of the prosecution version. Finally, the medical evidence was at total variance with the ocular evidence. Though ocular evidence has to be given importance over medical evidence, where the medical evidence totally improbabilises the ocular version that can be taken to be a factor to effect credibility of the prosecution version. The view taken by the High Court is a possible view. The appeal being one against acquittal, we do not consider this to be a fit where any interference is called for. The appeal fails and is dismissed."

[42] When we appreciated the evidence of the prosecution case as a whole and in exercise of putting weightage to the evidence of P.W.1 –

Banesingh Vajesingh, we are of the firm view that the small part of testimony of P.W.1 - Banesingh Vajesingh relied upon by the learned trial Judge, cannot be based for inflicting conviction to accused No.1 and 3 as this part of testimony is inseparable part with the remaining whole prosecution case.

[43] When we appreciated the prosecution case as a whole, we scrutinized the circumstances that in fact, there was no motive on the part of the accused to cause injuries to Banesingh Vajesingh, no enmity between the parties was shown as to attack Banesingh Vajesingh by the accused, as stated by him. It is not understood that all of a sudden, while 9 persons leashed with weapons like dharia, iron rod, sticks etc. would attack Banesingh Vajesingh. When the prosecution case gives an impression that accused were out and out to beat Bhailal and when no link between deceased Bhailal and injured Banesingh could be established by the prosecution case, more so

when both the incidents occurred at the distance of about more than 1 kilometer, the case of prosecution becomes improbable. When we refer to the evidence of witness P.W.2 Jalaji Vajaji, we find that he overheard the accused uttering that they intended to beat Bhailal and Ramesh and, therefore, from first incident they moved towards the scene of offence of second incident and that too chasing witness Jalaji. If that be so where was the necessity to cause injury to Banesingh, when there was no link between Banesingh and Bhailal. This infirmity goes to show that witnesses suppressed the genesis of the prosecution case. There is no evidence at all to even indicate a remote possibility of common object amongst the accused to beat Banesingh. The circumstance that how the accused would know that at particular time and juncture Banesingh and his brothers would be coming to the place of incident in rickshaw, so the accused can confront them, is the circumstance throwing doubt on whole prosecution case. This is again an improbability

and, therefore, assumes great importance. In a complaint filed by Banesingh before Adalaj Police Station even within an hour, he stated that he along with two other witnesses were on foot when first incident occurred. Perhaps Banesingh changed his version and brought Rixa theory to suit with the subsequent investigation by which panchnama of rickshaw is drawn and said rickshaw is found damaged. Consistent it is to note that when Bhailal was shifted to hospital, his relatives gave history to Doctor i.e. Dr. Tulsibhai Vishrambhai at Ex.24, who stated that relatives gave history that a fight was ensued on account of accident of rickshaw in which Bhailal received injuries. It must also be noted that P.W.3 – Dr.Tulsibhai Vishrambhai in his cross-examination in para-6 stated that on examination of patient (Bhailal) he found that the breath of this patient was smelling of alcohol and, therefore, he informed the police and then the police gave him a yadi at Ex.27. Omission on the part of the Investigating Officer to record the

statement of Bhailal, when he was conscious, creates shadow of doubt on the whole prosecution case. The evidence of eye witnesses are full of contradictions as afore stated which goes to the root of the case. The complaint which came to be filed by Banesingh is cryptic and named four persons which is important material contradiction in his deposition before the Court, which is discussed as above. Important part is, when no knife is referred in the complaint, to suit the medical evidence, witness Banesingh in his deposition stated that accused No.4 inflicted knife blow. The evidence of Banesingh is found untrustworthy and uncorroborated by other witnesses. As discussed above, infliction by accused No.1 of a stick blow and dharia blow by accused No.3, are the facts inseparable from the rest of the prosecution story because as per the prosecution case both the incident first and second were in same transaction. When major part of the prosecution case, on scrutiny is found improbable and not creditworthy and when major

portion of the evidence of witness Banesingh is found not trustworthy and unreliable, in our humble view mere some lines may be consistent with the medical evidence and F.I.R. must not be believed as per the reasons stated above because that consistency is not sure guarantee of truth weighing the whole prosecution case as disclosed by ocular evidence. P.W.1 – Banesingh is not a creditworthy witness. No other witness corroborates the say of P.W.1 – Banesingh in respect of a stick blow by accused No.1 and dharia blow by accused No.3 which in detail, we have scrutinized above. In these circumstances, the attempt on the part of the trial Court to separate chaff from grain on the principle of non-application of maxim of *falsus in uno, falsus in omnibus* in criminal trials is an error to convict accused No.1 and 3 for the offences punishable under Sections 324 and 323 of the Indian Penal Code. We suspect the statement of witness Banesingh in respect of role attributed by him to accused No.1 and 3, though it might

have been supported by medical evidence. When witness suppresses the genesis of the incident and when the witness is not found truthful, in major part of his testimony, in the facts and circumstances as discussed above, we are not inclined to rely on a statement of this witness to convict the accused No.1 and 3 as has been done by the trial Court. It is necessary to note that in such circumstances as have arisen in this case, the baffling question that arises is whether any truth lies in limited statement made by the witness. When Court suspects the whole creditworthiness of such witness, the limited statement made by the witness must be observed with suspicion and more particularly with reference to the whole prosecution case. When the Court finds a dilemma as to the acceptance of the limited version of a witness or not benefit of doubt must go the accused. We are of the firm opinion that having regard to over all scrutiny of the prosecution case and over all scrutiny of evidence of witness Banesingh, the part on which

the conviction is based, is not above suspicion and hence, the benefit of doubt must go to the accused to whom the trial Court awarded conviction relying upon the part of the testimony of the witness Banesingh. The trial court obviously erred in relying upon the testimony of Banesingh for the aforesaid reasons to convict accused No.1 and 3 and the said conviction and sentence is subject matter of this criminal appeal.

[44] For the aforesaid reasons, we reach to the following final conclusion.

[1] Criminal Appeal No.765/1986 preferred by the State against the order of acquittal stands dismissed. Bail bond submitted by the respondents stands cancelled.

[2] Criminal Appeal No.602/1986 filed by original accused No.1 – Ashok Somalal Thakkar and accused No.3 – Arvind Somalal Thakkar is allowed. The order of conviction and sentence of the trial Court in respect of accused No.1 – Ashok Somalal

Thakkar for the offence punishable under Section 323 of the Indian Penal Code is set aside and accused No.1 – Ashok Somalal Thakkar is acquitted for the offence punishable under Section 323 of the Indian Penal Code along with other accused. Likewise, the order of trial Court convicting and sentencing accused No.3 – Arvind Somalal Thakkar for the offence punishable under Section 324 of the Indian Penal Code is set aside and accused No.3 – Arvind Somalal Thakkar is also acquitted for the offence punishable under Section 324 of the Indian Penal Code along with other accused. The fine paid by accused No.1 and Accused No.3 is directed to be refunded to respective accused No.1 and accused No.3. Bail bonds submitted by accused No.1 and accused No.3, appellants in this appeal stands cancelled. The rest of the order of the trial Court in respect of muddamal etc., is not interfered with.

[J. R. VORA,J.] [BANKIM N. MEHTA,J.]

(vijay)